

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

In the Matter of Protest of:

CASE No. 2010-101

PSI Group, Inc.

Materials Management Office

POSTING DATE: February 16, 2010

IFB No. 5400001213

MAILING DATE: February 16, 2010

Statewide term contract for mail services)

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from PSI Group, Inc. (PSI Group), doing business as (d/b/a) Pitney Bowes Presort Services, which was received on January 6, 2010. With this invitation for bids (IFB), the Materials Management Office (MMO) attempts to procure a statewide term contract for the mail services of presorting and bar coding.

In order to resolve the matter, the CPO conducted a hearing on February 3, 2010. Appearing before the CPO were PSI Group, represented by Matthew Healy, General Manager; Consolidated Mailing Services, LLC (Consolidated Mailing), d/b/a G&H Mailing Services, represented by John Beach, Esquire; Presort Plus, Inc. (Presort Plus), represented by Robert Deegan, Vice President of Sales; and MMO, represented by John Stevens, State Procurement Officer.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On November 4, 2009, MMO issued the IFB. [Ex. 1]
2. On November 17, 2009, MMO conducted a pre-bid conference.
3. On November 19, 2009, MMO issued Amendment # 1 extending the bid opening. [Ex. 2]
4. On December 2, 2009, MMO issued Amendment # 2 answering the questions received from prospective bidders. [Ex. 3]
5. On December 18, 2009, MMO opened the bids received.
6. On December 30, 2009, MMO posted its intent to award. [Ex. 4]
7. On January 6, 2010, the CPO received PSI Group's protest.

CONCLUSIONS OF LAW

PSI Group alleged the following ground(s) in its protest letter:

PB Presort Services does not believe awards for Lots 1, 2, and 3 were made to the "lowest responsible and responsive bidder" as required by the "Award Criteria – Bids". Similarly, we do not believe the awards were made in compliance with the definition of "responsiveness" contained in the solicitation (i.e. "If a fixed price is required, an Offer will be rejected if the total possible cost to the State cannot be determined.")

Based on the manner in which the solicitation was structured, we feel it was South Carolina's intent for suppliers to include all cost factors in their offer and to assume all risk should actual costs change for whatever reasons. PB Presort Services' offered prices reflect this objective and assumed this risk. It is our contention that the pricing offered by the awarded suppliers do not reflect total actual costs and therefore place the risk of increased costs back on the State. PB Presort Services' offer fully met the requirement for responsiveness by setting forth the total cost to the State. We contend the pricing offered by the awarded suppliers did not meet this requirement.

PSI Group further alleged, "The pricing shown for the awarded bids only reflects suppliers' fees."

Regarding award of an IFB, the South Carolina Consolidated Procurement Code (Code) reads,

Unless there is a compelling reason to reject bids as prescribed by regulation of the board, notice of an award or an intended award of a contract to the lowest responsive and responsible bidders whose bid meets the requirements set forth in the invitation for bids must be given..." S.C. Code Ann. § 11-35-1520(10) [Emphasis added] The Code defines a responsive bidder as "a person who has submitted a bid or offer which

conforms in all material aspects to the invitation for bids.... S.C. Code Ann. § 11-35-1410(7) [Emphasis added]

In its letter, PSI Group stated that the awarded bidders for Lots 1, 2, and 3, Consolidated Mailing and Presort Plus, were “nonresponsive” to the IFB’s requirements because their bids did not include total cost to the State. Specifically, PSI Group argued the State should have required bidders to bid postage as well, which was not required to be bid by the IFB, because without it the total possible cost cannot be determined. However, PSI Group’s protest essentially involves its own opinion regarding the structure of the IFB and how MMO should have set forth the requirements for the bidders. This conclusion is further supported by PSI Group’s contention at the hearing that they felt it was in the State’s best interest to include such postage costs.

The IFB required bidders to submit bids for presorting and bar coding mail and delivery to the US Postal Service. [Ex. 1, p. 3, Scope of Solicitation] The IFB required “[a]ll mail to be presorted/bar coded must be transported by the contractor, at his expenses, to his place of business and, after sorting, to the main post office.” [Ex. 1, p. 15, General Requirements] The IFB reads further, “Bid one (1) price per piece of mail which qualifies for the presort or barcode discount. This one price per piece of qualified first class mail includes sorting, bar coding, handling and delivery to the US postal Service. All postage savings greater than the normal presorted rates, acquired by the value added bar coding, will be refunded to the individual agency entity as applies to their mail.” [Ex. 1, p. 19, Bidding and Performance Requirements]

MMO allowed prospective bidders to submit questions that were answered by Amendment # 2 dated December 2, 2009. Relevant to the protest at hand were the following questions and answers:

Question 1: If the vendor can provide a method that reduces the State’s cost using a different methodology from that described in the first section of Page 19, will the State accept this methodology?

Answer: No

Question 2: If the vendor has a way to show a total lower cost to the state, would that be considered?

Answer: See Response to no, 1 above.

Question 15: For lot #2 and #4, will any different process be allowed, that would result in the same postage costs and savings to the using governmental unit?

Answer: No

Question 16: Will you please verify that this statement is correct, to clarify the scope of work for the Presort First Class Mail requirements and the Bar Coding Requirements: The Using Governmental Unit will continue to meter the mail at regular presort rates, or permit imprint where applicable. The contractor will not provide the service of metering the mail, only the Presorting/Bar Coding mail services. The Contractor will not be responsible, in the regular course of services for this contract, to meter that mail for the Using Governmental Unit, except for applying additional postage as per the requirements. The mail will be metered by the Using Governmental unit.

Answer: Agencies will meter mail. However, on occasion, Contractor may be required to meter mail.

With this protest, PSI Group attempts to alter the requirements of the IFB by inserting a requirement that the bidders include postage in their bids. This suggestion was previously raised and specifically declined by MMO's answer to Question 15 above. PSI Group does not allege that the awarded bidders did not submit bids that conformed to the requirements of the IFB, but rather that the requirements of the IFB should have included other costs not required to be bid by the IFB. While that allegation might have been appropriately filed with the CPO during the solicitation process, it is untimely filed after award. Further, PSI Group cannot bootstrap a protest of the IFB's requirements by protesting that the awards do not consider all costs to the State.

The Code provides protest rights to prospective bidders who are aggrieved by the requirements of a solicitation. It reads,

A prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(a) within fifteen days of the date of issuance of the Invitation For Bids or Requests for Proposals or other solicitation documents, whichever is applicable, or any amendment to it, if the amendment is at issue. An Invitation for Bids or Request for Proposals or other solicitation document, not including an amendment to it, is considered to have been issued on the date required

notice of the issuance is given in accordance with this code. S.C. Code Ann. § 11-35-4210(1)(A).

Regarding a protest of award, the Code reads,

Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(b) within ten days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code; except that a matter that could have been raised pursuant to (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract. S.C. Code Ann. § 11-35-4210(1)(B) [Emphasis added]

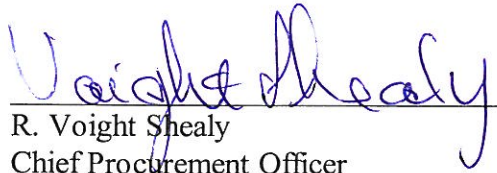
The IFB, which created the scope of work, was issued on November 4, 2009. PSI Group could have protested the solicitation requirements, but it did not. On December 2, 2009, MMO issued Amendment # 2, which was the last amendment, answering questions raised by the prospective bidders, including PSI Group, on this issue. PSI Group could have protested that amendment, but it did not. At the very least, PSI Group should have protested within 15 days of December 2, 2009. This protest was filed on January 6, 2010, which was well beyond the time required by the Code.

The South Carolina Procurement Review Panel (Panel) has ruled consistently that the filing requirement is jurisdictional. See Protest of National Cosmetology Ass'n, Case No. 1996-17; Protest of Vorec Corporation, Case No. 1994-9; Protest of Oakland Janitorial Services, Inc., Case No. 1988-13. In a situation similar to this protest, the Panel has also stated, “The issuance of the intent to award does not modify or extend the statutorily established time to protest a solicitation or amendment document.” Protest of First Sun EAP Alliance, Inc., Case No. 1994-11. PSI Group did not file its protest as to the solicitation within the time allowed by the Code. Therefore, the protest is untimely, and the CPO lacks jurisdiction to consider the matter.¹


¹ As stated above, the gravamen of PSI Group’s protest arises out of the way the IFB was structured and is untimely. To the extent that PSI Group asserted that the awarded bidders were nonresponsive and responsible because they did not include postage costs and it was responsive because it did include such costs, the CPO concludes that PSI Group failed to state a claim upon which relief can be granted. As to any remaining issues concerning responsiveness and responsibility based on the IFB requirements, the CPO agrees that Consolidated Mailing’s motion for a directed verdict must be granted

DETERMINATION

Because PSI Group did not file its protest within the time allowed by the Code, the protest is untimely and the CPO lacks jurisdiction to consider the matter. The protest is dismissed.



R. Voight Shealy
Chief Procurement Officer
for Supplies and Services



Date

Columbia, S.C.

because PSI Group presented no evidence in support of its contentions. When deciding motions for directed verdict, the evidence and all inferences which reasonably may be drawn must be viewed in the light most favorable to the nonmoving party. Fleming v. Borden, Inc., 316 S.C. 452, 450 S.E.2d 589 (1994). The Panel has treated a motion for directed verdict as a motion to dismiss for failure to meet the burden of proof. Protest of R.E. Harrington, Appeal by Gates, McDonald & Company, Case No. 2000-11.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2008 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2008 S.C. Act No. 310, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).



Presort Services

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January 6, 2010

Materials Management Office
State of South Carolina
Attn: Voight Shealy, Chief Procurement Officer
1201 Main Street
Suite 600
Columbia, SC 29201
Also submitted via e-mail: protest-mmo@mmo.sc.gov

Re: Solicitation 5400001213 – Bid Award Protest

Dear Mr. Shealy,
In accordance with Intent to Award 5400001213 notice dated December 30, 2009, PSI Group Inc. (Pitney Bowes Presort Services) provides this notice of protest to the award of Lots 1, 2 & 3.

PB Presort Services respects the procurement process used by the South Carolina Materials Management Office. We would not pursue this course of action if we did not strongly feel that the financial interest of the State was potentially compromised as a result of these award decisions. The following clearly outlines the nature of our request and why we believe corrective action is warranted.

Grounds for Protest

PB Presort Services does not believe awards for Lots 1, 2 and 3 were made to the "lowest responsible and responsive bidder" as required by the "Award Criteria – Bids". Similarly, we do not believe the awards were made in compliance with the definition of "responsiveness" contained in the solicitation (i.e., "If a fixed price is required, an Offer will be rejected if the total possible cost to the State cannot be determined.").

Based on the manner in which the solicitation was structured, we feel it was South Carolina's intent for suppliers to include all cost factors in their offer and to assume all risk should actual costs change for whatever reason. PB Presort Services' offered prices reflect this objective and assumed this risk. It is our contention that the pricing offered by the awarded suppliers do not reflect total actual costs and therefore place the risk of increased costs back on the State. PB Presort Services' offer fully met the requirement for responsiveness by setting forth the total cost to the State. We contend the pricing offered by the awarded suppliers did not meet this requirement.


Relief Requested

In order to determine the total cost of presorting services, one must consider postage plus any handling or processing fees as a total cost per unit. The pricing shown for the awarded bids only reflects suppliers' fees. PB Presort Services has requested that the State disclose the postage meter rate to be applied to each piece of 1oz. "letter" and "flat" sized mail piece for each awarded bid to assist in calculating "total possible cost to the State". We request the State use all applicable data to recalculate the total cost (total postage + fees) for each offer and Lot and to make the award to the supplier who provides the lowest overall total cost to the State.

Secondly, we request a meeting with you and/or other key personnel in the Materials Management Office to fully explain our position and to present the reasons why we believe these awards are not in the State's best interest. It is our desire to see that the State receive the lowest total cost for presort mail services. We do not believe these awards achieve that goal and we would welcome the opportunity to present our case.

For questions regarding this protest and/or to arrange a meeting please contact: Jacqueline Tyler, Sales Executive, PB Presort Services; mobile: 704- 299-0219; office: 704-391-1229, ext 109; e-mail: jacqueline.tyler@pbpresortservices.com. We look forward to your response and for the opportunity to meet with you in the very near future.

Sincerely,


Jay A. Oxtan
President & COO PSI Group, Inc.